

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 0167 OF 2022**  
**(Arising from Civil Suit No. 0271 of 2021)**

**DR. SAMUEL SSEMANDA KAZIBWE::::::::::::::::: APPLICANT**

**VERSUS**

- 1. CATHERINE MUKIIBI NABAWANDA**
- 2. STEPHEN MAYEGA ::::::::::::::::::::::::::: RESPONDENTS.**

**Before: Lady Justice Ketrah Kitariisibwa Katunguka.**

**Ruling.**

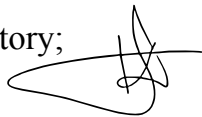
**Introduction:**

1. DR. SAMUEL SSEMANDA KAZIBWE (herein called ‘the applicant’) brings this application by Notice of Motion against CATHERINE MUKIIBI NABAWANDA and STEPHEN MAYEGA (herein called ‘the respondents’) **seeking** orders that; the exparte decree in Civil Suit No. 271 of 2021 be set aside; time be extended to allow him file the written statement of Defence and counterclaim out of time; the suit be heard inter party; execution of the decree in Civil Suit No. 271 of 2021. be stayed; and costs of this application be provided for.
2. The grounds of the application are contained in the affidavits in Support deposed by Dr. Samuel Ssemanda Kazibwe and briefly are that; the Applicant received a copy of the summons to file a defence and a plaint on the 19<sup>th</sup> of October 2021 and on the 25<sup>th</sup> day of October 2021 applied to the legal Aid Project of the Uganda Law Society seeking for



probono representation; upon verification by the pro bono scheme of the Uganda Law Society, the Applicant was found eligible for probono and a file was opened for him under LAP/KLA/259/2021 and later allocated to counsel Nyalwa Ezra from M/s Tayebwa, Sserwadda & Co. Advocates to handle on behalf of Legal Aid Project of Uganda Law Society;

3. On the 3<sup>rd</sup> February 2022, the Applicant was served with a letter from Eland Advocates requesting him to surrender his Duplicate Certificate of Title of the suit land for onward transmission to the Commissioner for Land Registration and to pay 10,000,000/= (Ten Million Uganda Shillings as costs of the suit; the Applicant never knew that that suit was proceeding against him exparte because his former advocate never informed him that he had failed to file the Written Statement of Defence;
4. The Legal Aid Project of the Uganda Law Society has assigned the Applicant another Advocate from M/s. Tayebwa, Sserwadda & Co. Advocates to handle his written Statement of Defence; the Respondents have already started executing the exparte decree and have written to the Applicant warning him to immediately surrender his Duplicate Certificate of title and to pay UGX 10,000,000; he has a strong defence and a counterclaim against the Respondent's plaint;
5. It is in the interest of justice and prevention of abuse of court process that the execution of the exparte decree be stayed and time be enlarged to allow the Applicant to file his written statement of defence out of time; if the Respondents are not restrained from proceeding with execution of the exparte decree, the Applicant is likely to suffer irreparable damage by being compelled to pay costs and surrendering his duplicate Certificate of title thereby rendering his proposed written statement of Defence and Counterclaim nugatory;



6. The application has been made without unreasonable delay and the Respondents will not be inconvenienced by the grant of the application since the applicant is willing to abide by any conditions imposed by court.
7. The Application is also supported by; a copy of the application addressed to the Legal Aid Project of the Uganda Law Society, a copy of the basic information of referral organisation of Pro Bono Scheme of the Uganda Law Society indicating LAP files Ref. No. LAP/KLA/259/2021, a Decree in Civil Suit No. 271 of 2021, a letter from Eland Advocates under Ref: EA/ULS/PB-KLA/090/2014 and a copy of the proposed written statement of defence.
8. The Application is opposed by Catherine Mukiibi Kazibwe who filed an affidavit in reply and contending that; the application and affidavit in support filed before this honourable court are incurably defective and incompetent for being filed belatedly or as an afterthought and served onto the Respondents out of time; they contain falsehoods that taint the entire evidence deponed in the affidavit in support and are without summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on;
9. Through her lawyers she and the 2<sup>nd</sup> Respondent filed a suit against the Applicant on 1/10/2021 in which they sought to protect their interest in the suit land; on the 19<sup>th</sup>/10/2021 the Applicant was served with summons to file a defence; belatedly and without justification the Applicant sought legal representation from the Uganda Law Society Legal Aid Project on the 25<sup>th</sup>/10/2021 by way of a letter;
10. The instant Application is overtaken by events because the default judgment and decree thereof has since been executed since the land office already registered the orders of this court on the Register on 3<sup>rd</sup>/2/2022; the Applicant has no defence and it is in the interest of justice that this application be dismissed with costs;



11. The Applicant made falsehoods in his affidavit in support of the motion since his file was allocated to one lawyer Mr. Kejwala Christopher and M/s. Ouma & Co. Advocates; the applicant shall not suffer any prejudice or loss as execution is the normal course of enforcement of court decisions where judgment debtors are compelled to make good for the faults;
12. This application was filed five months after the applicant had been served with summons to file a defence and more than one month from the date of receipt of the letter effecting execution;

**Representation;**

13. The Applicant is represented by Counsel Kejwara Christopher while the Respondent is represented by Counsel Denis Enap; both counsel filed written submissions which I have considered.

**The case.**

14. The respondents had filed CS No. 271 of 2021 against the applicant in this case together with the Commissioner for Land Registration; by letter they informed the Deputy Registrar that the applicant together with the commissioner for Land Registration was served with notice to file a defence but had not filed a defence and the time had lapsed; they prayed that a default judgment be entered under O9 rule 6 of the Civil Procedure Rules and for orders that;
- i. A declaration that the plaintiffs being children of the late Elisama Kazibwe, are beneficial owners of the suit property known as Busiro Block 351 plot 105 at Budo in Wakiso District, measuring approximately 1.740 hectares;*
  - ii. A declaration that the 1<sup>st</sup> defendant holds the suit property in trust for the plaintiffs as beneficiaries under the estate of the late Elisama Kazibwe;*
  - iii. A declaration that the 1<sup>st</sup> defendant is in breach of trust against the plaintiffs*

*iv. A declaration that the plaintiffs are entitled to equal shares and or use of the suit property as children of the late Elisama Kazibwe.*

*v. A permanent injunction restraining the 1<sup>st</sup> defendant and or his agents and or servants from selling, mortgaging, subleasing or otherwise alienating any interest in the suit property without the written consent of the plaintiffs.*

*vi. An order of court compelling the 2<sup>nd</sup> defendant to amend the register to reflect the plaintiffs' proprietary interest and or names on the register of the suit land; and*

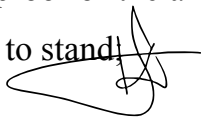
*vii. Costs of the suit.*

15. Based on the request in the letter dated 24<sup>th</sup> November 2021 a default judgment was entered; whereupon the plaintiffs/respondents herein, then went ahead to execute the orders they had sought in the plaint as detailed above particularly to require the Registrar of Titles Wakiso zonal office to add them as registered proprietors of the land comprised in Busiro Block 351 plot No. 105 at Budo.

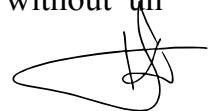
16. The Applicant claims that he was genuinely unable to file his defence in time because it took time for him to secure pro bono services from the Legal Aid Project from The Uganda Law Society and even when he did the counsel did not file the Written Statement of Defence and without the applicant's knowledge the case proceeded ex parte;

17. The respondent oppose the application and that in any case the matter has been overtaken by events because a letter has already been written to the Commissioner for Land Registration so the application should be dismissed;

18. Counsel for the applicant raised preliminary points of law to wit: the respondents proceeded under O9 rule 6 of the Civil Procedure Rules yet the plaint was not drawn claiming a liquidated demand therefore the registrar's entering a default judgment without any formal proof of the allegations in the plaint was erroneous and inappropriate so should not be left to stand!



19. That O 9 rule 10 of the Civil Procedure Rules provides that where a defence is not filed in time the suit may proceed as if the party has filed a defence; that the matter therefore should have gone for formal proof; Counsel cited Makula international Ltd vs Emmanuel Nsubuga & Anor. CANo.4 of 1981HC 1982 page 11; and argued that the order should not be left to stand.
20. Counsel's second preliminary point of law is that under O50 rule 3 of the Civil Procedure Rules, Registrar's powers are limited to miscellaneous matters arising from civil suits and do not extend to disposing off civil suits; he cited AG vs James Kamoga CA 8/2004 where it was held that the Registrar's powers are restricted to enter judgment in contested cases and consent judgments and where the rules specifically provide for specific powers; citing Pastori vs Kabale District Local Government Council and others [2008] 2 EA 300, counsel argued that a court acting without jurisdiction or contrary to the provisions of the law or in its principles are instances of illegality, by implication render the entire proceedings null and void; that therefore the exparte decree in CS No. 271 of 2021 was entered in error since the registrar is not vested with jurisdiction to entertain contested matters before the high court that needs formal proof and failure by the applicant to file a written statement of Defence in time does not shift the burden of proof from the respondents/plaintiffs.
21. On the merits of the application counsel cited Andrew Bamanya vs Shamsherali Zaver SC CA No. 70/2001; and Hjati Safina Nababi vs Yafesi Lule, CA No.9 of 1998; and submitted that mistakes of counsel should not be visited on the litigant; that once one instructs counsel then one should not be expected to share the conduct of the case with counsel; and that applications for extension of time are so that the merits of the case are conclusively determined without locking any one of the parties out as that would be denial of justice; that the counsel for the applicant was suffering from Covid 19 but later filed a defence albeit late; the application to set aside has been brought without un



reasonable delay; the respondents shall not be inconvenienced since the applicant is willing to comply with any conditions set by court; the applicant has shown sufficient reason for not filing his defence in time; he cited Rosette Kizito vs Administrator General & Ors SCCA No. 9/1996; none of the cases cited by counsel were availed to court;

22. For the respondent counsel framed the following issues: *i. Whether the instant application is competently filed before this honourable court. ii. Whether the Applicant's preliminary objection is sustainable and or viable. iii. Whether the Applicant's application meets the threshold for the grant of orders setting aside an exparte decree, extension of time to file a defence and stay of execution among others.*

23. On whether the instant application is competently filed before this honourable court; counsel then was submitted that the counsel for the applicant defied the timelines directed by court to file and serve submissions when he filed and served the same on the 14<sup>th</sup> day of December, 2022 instead of 31<sup>st</sup> day of November, 2022; and has offered no justification; that that is illegal and amounts to contempt of the court order; for this he relied on *Siiku Muzamil versus Fred Bamwesigye and others, HCMA No. 0387/2022* where Hon. Justice Musa Ssekaana cited with authority the case of *Kenya Tea grown association v. Francis Atwoki & 5 others (2012) Eklr*; that irrespective of the length of the delay it must be explained which the applicant did not do; he cited *Mulindwa William versus Kisubika Joseph SCCA No. 12/2014* and prayed that the Applicant's written submissions be struck off the court record or if court is inclined to accept them the respondent should be awarded costs;

24. That the application was even served out of the prescribed 21 days, the same having been issued by this Honourable Court on the 14<sup>th</sup> day of February, 2022 and only served onto the Respondents on the 7<sup>th</sup> day of October, 2022; approximately 8 months after the issuance of the summons thereof; contrary to Order 5 of the Civil Procedure Rules; and so the notice of motion should be dismissed; for this he relied on *Stop and See (U)*



*Limited versus Tropical African Bank Limited HCMA No. 333/2010; Kazoya Dickson versus Baseka Edward HCMA No. 1234/2019; Gladys Senkubuge and Another versus Kibirango Joyce HCMA No. 1704/2019*; that the affidavit is full of falsehoods in paragraphs 2,3,4,5,6,8,9 and 10 and such can not be relied upon; he cited *Jetha Brothers Ltd vs Mbarara Municipal Council & 4 others HCMA No. 31/2004 citing Sirasi Bitaitana vs Emmanuel Kananura [1977] HCB 34; Anthony Okello versus Ojok B'leo and 2 others HCMA No. 26/2006; Rutuku Francis and 5 others versus Eliphas Ndamagye, CACAppn. No. 111/2017; Sirasi Bitaitana vs Emmanuel Kananura [1977] HCB 34; Anthony Okello versus Ojok B'leo and 2 Others HCMA No. 26/2006*; that the application lacked summary of evidence, list of witnesses and documents contrary to Order 6 Rule 2 of the Civil Procedure Rules; so the affidavit in support should be struck off; he cited *Ssembatya Bumbakali and Another versus Eco Petro Uganda Limited HCMA No. 199/2015*; that the default judgment for the Respondents in the terms as set out by the Plaintiff vide HCCS No. 271/2021 be upheld;

25. On whether the **Applicant's preliminary objection is sustainable and or viable** counsel charged that it is misconceived and a wrong appreciation of the distinction between *ex parte* and default judgments; that the Respondents sought and were granted a default judgment under Order 9 of the Civil Procedure Rules. No *ex parte* judgment was sought as a result; that in uncontested case, judgment may be entered by the Registrar under *Order 50 Rule 2 of the Civil Procedure Rules*; he also cited *Attorney General and Another versus James Mark Kamoga and Another, SCCA No. 8/2004*; that according to *Black's Law Dictionary 11<sup>th</sup> Edition* 'uncontested case or hearing' means one of the parties has failed to appear despite notice; the Respondents filed a suit against the Applicant on the 1<sup>st</sup> day of October, 2021, summons to file a defence were issued by this Honourable court on the 4<sup>th</sup> day of October, 2021 and the same served onto the Applicant on the 19<sup>th</sup> day of October, 2021. The Applicant opted to deliberately place himself outside the jurisdiction of this court by not filing his defence within 15 days from the date of





service; the respondent applied for a default judgment upon the lapse of thirty six (36) days; the applicant neglected to apply for leave to file his defence out of time; counsel cited *Mulindwa George William versus Kisubika Joseph SCCA No. 12/2014* for the proposition that to avoid delays, rules of courts provide a time within which certain steps ought to be taken so timelines are not mere technicalities as they must be observed; that therefor the preliminary objection ought to be overruled.

26. On **whether the Applicant's application meets the threshold for the grant of orders for setting aside an exparte decree, extension of time to file a defence and stay of execution among others**; counsel submitted that an order for extension of time within which to file a defence can only be granted only when the applicant has plausible defence on the merits of the main suit; and the applicant is not merely trying to delay and where the respondent shall not suffer injustice; counsel cited *Mable Mabumba versus Haruna Semakula HCCS No. 589/1991*; counsel contends the applicant has not met the conditions; the application has been overtaken by events; the applicant has not proved that he had sufficient reason for not filing a defence in time and that he took the necessary steps within the prescribed time; counsel cited *Mulindwa George William versus Kisubika Joseph SCCA No. 12/2014*; counsel contends that the applicant is responsible for his counsel's actions so this application to set aside the default judgment is not justified;

### **Analysis**

27. I shall make my analysis based on the issues framed by counsel for the respondent; I appreciate the case law provided especially by counsel for the respondent; I have considered the application and the submissions by counsel; I shall consider the preliminary points of law on the **effect of a default judgment and the powers of the registrar in that regard**;



### **Preliminary points of law.**

28. The record shows that a default judgment was sought under Order 9 rule 6 of the Civil Procedure Rules; and it was entered on 25<sup>th</sup> November 2021 and a decree issued on 22<sup>th</sup> January 2022 granting all the prayers as detailed above except for damages which was abandoned; Order 9 rule 6 is reproduced here; *'Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs'*. (emphasis supplied);
29. A liquidated demand is defined in **Stroud's Judicial Dictionary**: to mean inter alia and includes, 'the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in money, a statutory demand for the payment of a total debt and an amount due on a judgment);' it is a sum certain in money terms; (see *Transtel Ltd & Anor v Mahi Computers & Appliances Ltd & Anor (Civil Suit 397 of 2015) [2017] UGCommC 88 (06 September 2017)*); and **Uganda Baati vs. Patrick Kalema High Court, Commercial Division, Civil Suit Number 126 of 2010**;) clearly the default judgment is entered because the amount is ascertained; Order 9 rule 10 provides; *'In all suits not by the rules of this Order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this Order, the suit may proceed as if that party had filed a defence'*; (emphasis supplied).
30. In such a case the decision by the Registrar would not be final but interlocutory, pending the matter being heard by a judge; indeed the file cover shows that the case was before me but it actually was never presented to me! In the normal course the suit proceeding would mean that the plaintiff would present his/her case with evidence for court's determination; in the case at hand there is no proof that evidence was led/that there was formal proof.

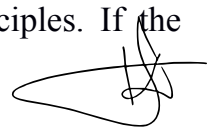
31. Courts have held that even if the defendant has not filed a defence the case must pass probity (see **Samwiri Massa vs Rose Achen (1978) HCB 297;**) a matter like the instant one where there is dispute over estate of a deceased person, can not be put to rest by a default judgment because it would have merely passed on a technicality but the gist of the conflict will remain; article 126 of the Constitution enjoins courts to administer substantive justice without undue regard to technicalities; section 33 of the Judicature Act empowers this court to make orders that would ensure multiplicity of suits is avoided;
32. A look at the reliefs sought shows that they can not be defined as liquidated/established; the issue of whether the plaintiffs are children/ beneficiaries of the late Elisama Kazibwe or the capacity in which the suit property is held is not a given; unless they are investigated no reconciliation can be expected;
33. On the powers of the registrar counsel for the respondent stated the definition of uncontested cases envisaged under O 50 rule 2, here reproduced; *'In uncontested cases and cases in which the parties consent to judgment being entered in agreed terms, judgment may be entered by the registrar'*; according to Black's Law Dictionary 11<sup>th</sup> Edition as when 'one of the parties has failed to appear despite notice'; I would agree with the definition and indeed the default judgment was entered but subject to the matter being set before a judge for formal proof/as if the defendant had filed a defence; which was not done;
34. In the premises I agree with the applicant that the default judgment ought to have been followed by proceedings for formal proof; **the process was an illegality which can not be allowed to stand; the preliminary points of law are upheld;**
35. Counsel for the respondent argued that the **applicant ought to have filed an application for leave to serve the application out of time** because it was endorsed on 3<sup>rd</sup> March 2022 and served on them on 7<sup>th</sup> October 2022; Considering that the date is fixed by court

and, court did not dismiss the application when the initial 21 days lapsed, and instead fixed a later date; also considering that the application has brought to the attention of court an illegality that can not be allowed to stand; the handmaidens here shall be subject to substantive justice; court is therefore deemed to have extended the time within which to serve; in the interest of justice pursuant section 98 of the Civil Procedure Act **the objection raised by the respondent is over ruled;**

36. On the **merits of the application** the law on seeking to be allowed to file a defence out of time is known; the applicant must have plausible defence on the merits of the main suit; is not merely trying to delay therefore must show he had sufficient reasons for the default; and the respondent shall not suffer injustice; (see *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani)* HCCC NO. 2255 of 2000 [2002] 1 EA 65;)

37. In **S.C. Civil. Application No. 6 of 1987 Florence Nabatanzi v. Naome Binsobedde** (cited with approval in **Hikima Kyamanywa v. Sajjabi Chris CACA No. 1 of 2006**), it was held by the Supreme Court that “sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.” (see also In **Maluku Inter Global Trade Agency -v- Bank of Uganda [1985] HCB 65;**

38. In **Rosette Kizito Vs. Administrator General and Others, SCCA No. 9 of 1986**, court stated that “sufficient reason (cause) must relate to the inability or failure (of the applicant) to take a particular step in time”; in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** it was held that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the



appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy;

39. The orders sought include change in registration on the Certificate of title held by the applicant yet according to the brief submitted to Legal Aid Project the applicant claims that the land which he jointly owned with the deceased father belongs to him; this is a triable issue not frivolous;

40. The applicant sought pro bono services from the Legal Aid project of the Uganda Law Society, a week (on 25<sup>th</sup> October 2021) after he was served with summons to file a defence on 19<sup>th</sup> October 2021; counsel Nyalwa Ezra from Ms Tayebwa Sserwadda & Co. Advocates who was allocated the file did not take the necessary steps; the applicant then received a letter requiring him to surrender his duplicate certificate of title and to pay UGX 10,000,000/= as the costs of the suit; he claims that he was not in control of the process of the Uganda Law Society; he was not aware that the matter had proceeded *ex parte*;

41. In *Hikima Kyamanywa vs Sajjabi Chris* C.A.C.A No. 1 of. 2006 Justice L.E.M. Mukasa-Kikonyogo, DCJ explained that for effective administration of justice, the courts are enjoined to investigate all disputes and decide them on merit. Errors or lapses of counsel should not be visited on litigants who have no control over advocates; in *Engineering TradeLinks Ltd v. DFCU Bank Ltd* Misc. App. No. 337 of 2014 (arising out of C.S No. 593 of 2012) it was held that denying a party the opportunity to be heard shall be the last resort of court;

42. I have considered that the applicant sought the services of a lawyer which were granted; from then the processes of the Uganda Law Society can not be attributed to the applicant; when the counsel was finally allocated the file he did not act in time; the applicant on



3/2/2022 received a request to submit the title and pay costs; he filed this application on 3/03/2022; **I find that he acted without undue delay.**

43. It is argued for the respondent that the application has been **overtaken by events** but; this court having found that the decree was erroneously issued the whole process was a nullity so the application can not be over taken by a nullity; Having considered the steps taken by the applicant it is found that **the default was unavoidable on his part**, therefore there is sufficient cause to grant this application to allow the case be heard on its merits;

44. On **costs**; having found that this application was not served when it should have and the applicant did not seek leave to serve out of time; but in the interest of substantive justice court has allowed it, each party shall bear their own costs;

In the premises the application is granted. I make the following orders:

1. The exparte decree in Civil Suit No. 271 of 2021 is hereby set aside;
2. Time is hereby extended allowing the applicant herein to file his Written statement of Defence and counter claim out of time but in any case not latter than within 30 days from this Ruling.
3. Civil Suit No. 271 of 2021 shall be heard inter party.
4. Execution of the decree in Civil Suit No. 271 of 2021 is hereby stayed;
5. Each party shall bear their own costs.



Ketrah Kitariisibwa Katunguka

Judge

3/3/2023

Delivered by email to :  
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